

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**AUDREY M. SILVEY, III**

Claimant

VS.

**CARGOTEC USA, INC.**

Respondent

AND

**ACE AMERICAN INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,063,355

**ORDER**

Claimant requests review of Administrative Law Judge Kenneth J. Hursh's January 16, 2013 preliminary hearing Order. Derek R. Chappell of Ottawa, Kansas, appeared for claimant. Steven J. Quinn of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

Claimant filed an application for hearing on November 29, 2012, alleging injuries to both hands, wrists, arms and all parts of body affected on October 30, 2012. Judge Hursh denied compensability after finding claimant's date of repetitive trauma was October 15, 2012, and that notice was untimely when provided on November 7, 2012.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the January 16, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

**ISSUE**

Claimant requests that the Board reverse Judge Hursh's Order and find that he provided timely notice, pursuant to K.S.A. 44-520, and that respondent should be ordered to provide medical treatment. Respondent wants Judge Hursh's decision affirmed.

**FINDINGS OF FACT**

Claimant began working full-time for respondent around May 1 or possibly May 7, 2012. Respondent makes trucks and forklifts in an assembly-line facility. Claimant initially worked as a "plumber," which involved running hoses through the frame of forklifts and installing wheel motors. Claimant testified his job duties required extensive use of his upper extremities and putting his hands and arms in awkward positions. Within a week, claimant noticed pain and tingling in his hands and wrists.

On May 13, 2012, claimant sought treatment on his own for moderate bilateral wrist pain at the Ransom Memorial Hospital emergency room. The Emergency Nursing Record reflected claimant's chief complaint was bilateral wrist pain/swelling for 24 hours and indicated "Working at Ottawa Truck<sup>1</sup> x 1 wk. Doesn't recall injury - just repetition [sic]."

Claimant testified that he knew his symptoms at that time were due to his work for respondent. The Emergency Physician Record poses a "where" question, presumably asking where symptoms were noted. The word "home" was circled, as was the word "work," followed by a question mark. In the "context" section of the Emergency Physician Record, the E.R. physician, Thomas Samuel Mitchell, Jr., M.D., noted claimant "works [with] pipes all day." The record is not entirely legible, but "pain on movement" was circled and it appears the word "repetitive" modifies claimant's work with pipes. Dr. Mitchell diagnosed claimant with carpal tunnel syndrome.

The ExitCare Patient Information sheet showed a preliminary diagnosis of carpal tunnel syndrome. Claimant was prescribed medication and advised to follow-up with Dr. Sinclair or his primary care physician. Claimant testified he was not told by emergency room staff that his condition was work related. Claimant testified he remained symptom free for approximately two weeks to a month or perhaps even a couple of months after his visit to Ransom Memorial Hospital.

Claimant continued to work his regular job until the end of August 2012. The record is unclear, but at least by October 2012, claimant had been switched to "motors" which involved putting motors together using hand and vibratory tools. This work activity caused claimant's symptoms to worsen. Claimant did not seek treatment between May and October 2012, although he still experienced symptoms.

On October 15, 2012, claimant went to his primary care physician, Robert D. Nichols, M.D., with complaints of numbness and pain in his hands extending up into his forearms. Dr. Nichols' assessment was carpal tunnel syndrome. Claimant was prescribed Diclofenac and wrist splints. Dr. Nichols ordered an EMG. Dr. Nichols issued an Excuse for Absenteeism/Return to Work slip dated October 15, 2012, which indicated claimant "was unable to attend work today." The off work slip did not state why claimant needed to be excused from work. Claimant testified that Dr. Nichols told him that he might have carpal tunnel syndrome, but never said such potential diagnosis was work related. Claimant testified he had no idea what was wrong with his hands as of October 15, 2012.

Farhan Sheikh, M.D., a neurologist, administered an EMG to claimant on October 30, 2012. The EMG showed "evidence of bilateral moderate carpal tunnel syndrome." Claimant testified Dr. Sheikh said his condition was work related, but told claimant he would have to discuss it with Dr. Nichols as Dr. Nichols had the "final call."

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<sup>1</sup> There is no showing in the record if respondent and Ottawa Truck are the same entity.

On November 6, 2012, Dr. Nichols issued another Excuse for Absenteeism/Return to Work slip which stated:

Audrey Silvey III was unable to attend work 10/15/12. The patient was seen in our office that day for numbness in both hands and diagnosed with Carpal Tunnel Syndrome. I referred the patient on to see neurologist, Dr. Sheikh, whom he saw on 10/30/12.<sup>2</sup>

Claimant returned to Dr. Nichols on November 7, 2012. Dr. Nichols noted the EMG showed median nerve impingement. Dr. Nichols indicated "[t]his condition is no doubt work related" and referred claimant to an orthopedic physician for carpal tunnel release. Claimant was restricted against repetitive wrist movements and especially repetitive wrist and hand movements against resistance.

Claimant provided notice to respondent on November 7, 2012. Claimant admitted that he knew his bilateral hand pain was due to his work activities from May through November 2012.<sup>3</sup>

On November 14, 2012, claimant was seen by Dale D. Dalenberg, M.D., an orthopedic surgeon, at Dr. Nichols' request. The history provided by claimant indicated he had been experiencing bilateral hand numbness and tingling for two months, which was particularly bothersome at work due to the use of vibratory tools. Dr. Dalenberg diagnosed claimant with moderately severe bilateral carpal tunnel syndrome and recommended bilateral carpal tunnel releases. Dr. Dalenberg noted:

There is a good case that this is work related. Most medical literature causes me these days to deny a work relationship with carpal tunnel syndrome, but the exceptions are heavy repetitive use, such as meat-cutting, or vibratory tools, such as jackhammer use. This patient qualifies as using vibratory power tools at work on a regular basis.<sup>4</sup>

Judge Hursh ruled that claimant suffered repetitive trauma due to his work activities and claimant's employment was the prevailing factor in causing his carpal tunnel syndrome. As noted above, Judge Hursh found an October 15, 2012 date of injury by repetitive trauma. Judge Hursh noted claimant had 20 days, or until November 4, 2012, to provide timely notice. As Judge Hursh concluded claimant provided notice on November 7, 2012, claimant was three days late in providing notice and compensability was denied.

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<sup>2</sup> P.H. Trans., Cl. Ex. 1 at 5.

<sup>3</sup> P.H. Trans. at 31-32.

<sup>4</sup> P.H. Trans., Cl. Ex. 3.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

. . .

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-520 states in part:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

...

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

### ANALYSIS

#### **Did claimant provide timely notice?**

Whether notice provided by claimant was timely depends on the date of injury by repetitive trauma, which is a legal fiction.<sup>5</sup> Judge Hursh ruled claimant provided notice for his injury by repetitive trauma on November 7, 2012. Judge Hursh indicated claimant's injury by repetitive trauma occurred on October 15, 2012. Claimant needed to provide notice within 20 days from seeking medical treatment for his injury by repetitive trauma<sup>6</sup> or 30 days from the date of injury by repetitive trauma, whichever came first.

The date of injury by repetitive trauma is based on the earliest of several triggering events listed in K.S.A. 2011 Supp. 44-508(e), as noted above on page 4. The first two considerations for an injury date are based on when a claimant is taken off work or provided modified or restricted duties due to diagnosed repetitive trauma. Claimant was taken off work by Dr. Nichols on October 15, 2012. Dr. Nichols later clarified that claimant was taken off work on such date due to carpal tunnel syndrome.

Dr. Nichols took claimant off work due to diagnosed repetitive trauma, namely carpal tunnel syndrome, on October 15, 2012. Based on the record as it currently stands, claimant's date of repetitive trauma was October 15, 2012. Claimant had 20 calendar days

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<sup>5</sup> *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

<sup>6</sup> The Board has interpreted the 20 days notice requirement as 20 days from the date claimant sought medical treatment for the repetitive trauma injury after the date of injury by repetitive trauma has been established under K.S.A. 2011 Supp. 44-508(e). See *Shields v. Mid Continental Restoration*, No. 1,059,870, 2012 WL 4763702 (Kan. WCAB Sep. 19, 2012).

from the date of seeking medical treatment to provide notice. Twenty calendar days later would be November 4, 2012. His deadline to provide notice was November 5, 2012, the next non-Saturday or Sunday, pursuant to K.S.A. 60-206. Notice was provided on November 7, 2012. While this is a painful result, notice was untimely. Therefore, this proceeding is not maintainable under the Kansas Workers Compensation Act.

### **CONCLUSIONS**

The undersigned Board Member finds: (1) claimant's injury by repetitive trauma occurred on October 15, 2012; and (2) notice was untimely.

The above preliminary hearing findings and conclusions are neither final nor binding as may be modified upon a full hearing.<sup>7</sup> This review of a preliminary hearing Order was determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to review by the entire Board when the appeal is from a final order.<sup>8</sup>

### **DECISION**

**WHEREFORE**, the undersigned Board Member affirms Administrative Law Judge Kenneth Hursh's January 16, 2013 preliminary hearing Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2013.

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HONORABLE JOHN F. CARPINELLI  
BOARD MEMBER

c: Derek R. Chappell  
rsmith@dchappelllaw.com  
dchappell@dchappelllaw.com

Steven J. Quinn  
vgeoghegan@fsqlaw.com

Honorable Kenneth J. Hursh

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<sup>7</sup> K.S.A. 44-534a.

<sup>8</sup> K.S.A. 2011 Supp. 44-555c(k).